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BOOK REVIEW

CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE- STATE ASSOCIATIONS

BY R.C. CASAD. LAWRENCE: REGENTS PRESS OF KANSAS, 1981.
PP.258.

This comparison of the three systems shows that in every respect except one, the Central American one does not go as far as the others do toward providing a uniform region-wide system of expeditious recognition and enforcement of the judgments of sister states. Although the Bustamante Code regime, which prevails generally in Central America, applies in theory to more different kinds of orders than do the other two, this advantage is more than offset by numerous drawbacks. The enforcement procedure in most of the countries is more complex and cumbersome, the grounds for refusing recognition are more numerous, and the conditions upon which recognition can be denied are subject to more uncertainty and variation than is true in the U.S. and the EEC systems. The international competency standards of the Bustamante Code are really not uniform, since the code, in most ordinary cases, defers to local rules in cases where they conflict with those of the code. And even in matters for which the code does not defer to local rules, individual states may reserve the right to apply their own law, thus preventing the realization of a uniform region-wide system. The discredited reciprocity requirement does have some force even in connection with the judgments of sister states. The public-policy exception is free to operate without any effective limitation. The rules relating to recognition of judgments for the *res judicata* effects are confusing and ambiguous. There is not even agreement among the countries as to whether *exequatur* is required in connection with mere recognition. There is no provision in the Bustamante Code for the problem of inconsistent judgments.¹

1. R. CASAD, CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS 166-67 (1981).

These are not words that encourage harmonization of private international law regarding the recognition and enforcement of civil judgments in Central America. Casad's conclusion is also not surprising after his meticulous presentation of how foreign judgments are, or more accurately are not, recognized and enforced in this region. The inability of the Central American nations to achieve even a modest measure of unification of civil judgment recognition and enforcement is hardly surprising. It is, however, disappointing to Casad, to this reviewer, and to other observers of legal developments in these nations who have learned that more than signatures on documents are necessary. Multi-state associational harmony in Central America has been transitory. Since the twenty-one year old Federation of Central America dissolved in 1845, the most lasting of these associations has been the economic integration effort of the Central American Common Market. It achieved notable successes in its first dozen years of existence, but succumbed to the internecine quibbling of Honduras and El Salvador. Their ignominious "Soccer War" sparked a serious breach.

Casad sets the stage early in his book. He describes the history of the associated status of these states, then deftly proves that the current state is an attitude of a judicial sovereignty which permits little trespassing even by nations with close historical association. The title of the first chapter discloses Casad's positive perception of Central America: "Central America: Integration and Reunification." Briefly outlined are the attempts, and the occasional modest achievements, at political unification after the end of Spanish rule. But however intense has been what he refers to as the "impulse toward reunification," he fairly documents that each success has been followed by a disappointment.² Effectively outlined is how legal institutions within the area, including constitutions, have provided a more conducive forum for unification than any yet achieved. However permissible these institutions may be, and to whatever extent the periodic rhetoric suggests an impulse for reunification, the facts nevertheless emphasize the disappointments and the relatively dim prospects for achieving consistency in the recognition and enforcement of civil judgments within the area. There has been frequent talk of a reunification in Central America. Talk, however, has always been a primary commodity in Latin America. Casad mentions the 1877 Treaty of Friendship, Peace, and Commerce signed by five nations, stating that the countries

2. *Id.* at 3.

were "disintegrated members of the same political body."³ Whenever the protection of sovereign turf has been at issue, Central American nations have shown little more interest in political, economic or judicial harmony among themselves, than with any four randomly selected nations from other corners of the globe.⁴

Casad, who has devoted many years of study to judicial institutions in Central America,⁵ systematically devastates any myth of significant harmonization within the area of recognition and enforcement of civil judgments. This was not the original purpose of his study. The reader is left with the impression that Casad wishes sincerely that his chosen path had led him to a contrary conclusion. Casad's sympathies affect his accuracy only infrequently. He suggests surprise at the failure of the Central American Common Market to have a judicial institution "in view of the relative success enjoyed by the earlier Central American Court of Justice."⁶ That court, however, only functioned for its planned initial ten year term.⁷ Casad's statement "that judicial institutions have by and large, functioned well in Central America"⁸ is therefore a point of some disagreement. This statement pertains more to the possibility of the extension of the harmonization of judicial institutions and establishment of a Central American court, than it does to individual domestic courts in each nation developing an awareness of the benefits of harmonization. The latter is a judicial comity yet to be recognized in any but isolated decisions.

The author permitted only a slight infusion of the region's last

3. *Id.* at 4.

4. Few observers believe that any political integration is a serious possibility. The economic integration survived partially because of a political-economic homogeneity among the nations. That no longer exists. Contemporary hostilities between and among the nations, founded on often extreme differences in political and economic philosophies, are hardly conducive to integration of even the most politically and economically benign transnational interests.

5. See, e.g., R. CASAD & R. SOTELA, *EXPROPRIATION IN CENTRAL AMERICA AND PANAMA: PROCESS AND PROCEDURE* (1975).

6. R. CASAD, *supra*, at 11.

7. It heard ten cases. Each of the five claims initiated by individuals was denied. The court rendered two affirmative judgments, both against Nicaragua. Nicaragua refused in both cases to comply with the decision. The United States, however, shares some of the blame. See CASAD, *supra* note 1, at 8. The disappointing history of this ambitious attempt is outlined by Manley Hudson in Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759 (1932). There were few positive effects of the court, but many institutional obstacles to any probable success, obstacles which seemed as predictably retarding to its success as those Casad discusses about the efforts to unify civil judgment recognition and enforcement.

8. R. CASAD, *supra* note 1, at 11, 14.

decade of economic and political conflicts to enter into his research. Casad expected that the subject matter of his study could be harmonized amidst even serious divergences in economic and political structures.⁹ Infrequently, elements of the more recent extreme political and economic dislocations that occur in the region creep in by implication. An example noted by Casad is Nicaragua's refusal to sign the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards.¹⁰ Casad's prefatory comments suggest, however, the possible futility of considering integration of Central America at this time. He further noted that the history of Central America "has been marked by tension and turmoil."¹¹

The express goal of Casad's study is to make some contribution to the process of integration, either when the current tensions have diminished or when there is a renaissance of common interests (however transitory and inconclusive). While assessing Casad's success must await a later date, his wish may well be fulfilled, because the book is a most effective identification of the inconsistencies among the Central American states regarding the recognition and enforcement of foreign civil judgments. Perhaps more importantly, it is a clear exposition of how inconsistent the area's development has been through the years, particularly when the restricted and varied acceptance of the Bustamante Code of 1928¹² and the Inter-American Convention of 1979 is considered. The latter was signed by all except Nicaragua, but has not yet been adopted by any of these Central American nations.

A basic premise of the book is that for states linked together in some form of association, whether it is a federation as exists in the United States, an economic union exemplified by the European Economic Community, or some less formal association, the recog-

9. To speak of the harmonization of legal institutions among these nations requires the added qualification that not all of the inhabitants function actively within the dominant legal institutions. Casad notes the racial composition in the various nations. See CASAD, *supra* note 1, at 1. The harmonization of the treatment of judicial decisions which Casad discusses even theoretically affects less than a third of the population in Guatemala, although it affects a larger but uncertain percentage in the other nations. This legal pluralism which exists within several of the nations does make for a complex national legal system, but should not pose a significant obstacle to the harmonization of elements of the legal system engaged in transnational activities.

10. R. CASAD, *supra* note 1, at 169.

11. R. CASAD, *supra* note 1, at XIII.

12. Bustamante Code of Private International Law, Havana, Cuba, February 20, 1928, entered into force November 25, 1928.

dition of the judicial decisions of member states is strengthened by such association.¹³ The existence of the association adds association interests to the judicial determination of recognition or denial of a foreign judgment. The scope of any such "association of interests" currently existing in Central America in recognizing and enforcing individual nation's courts judgments is debatable. The national decisions later discussed by Casad might be expected to disclose these associated interests. Unfortunately they do not. Casad is unable to offer evidence that courts in Central American nations have expressly shown a greater willingness to enforce judgments from courts in other Central American nations, than to enforce the decisions rendered outside the region. One may indeed find numerous instances of the recognition, if not the enforcement, of foreign judgments between nations of no greater association than participation in the global community, than exhibited among the Central American states. Recognition and enforcement may be enhanced by close association, and may indeed be mandated by a federal system such as in the United States. In the absence of an enforceable association mandate, association interests usually will not be sufficient. There first must be a commitment to the harmonization of international interests that is stronger than procedural and substantive judicial sovereignty.

Casad outlined a comparison of judgment recognition in the United States and the European Economic Community. He suggests that comity is not a sufficient justification for recognizing foreign judgments, because the interests of the recognizing state often may not be very strong. An emphasis on comity also obscures real interests which should be considered. Outlining five of the interests identified by Trautman and Von Mehren, Casad suggests that although an appropriate judgment recognition regime should reflect a "rational balance" between national interests favoring and opposing recognition, most regimes are not based on such interest weighing analysis.¹⁴ It is, however, important to note that even if the weighing of local interests results in favoring non-recognition, the state's interest may not be sufficiently strong in comparison to the desirability of granting recognition and the promotion of a just

13. R. CASAD, *supra* note 1, at 21.

14. Professor von Mehren was writing at the same time as Professor Casad on judgment recognition in the EEC and the United States. See von Mehren, *Recognition and Enforcement of Sister State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044 (1981).

result. When some thought is given to a consideration of external factors it tends to be either an expression of reciprocity (the judgment will not be enforced unless the foreign country will enforce judgments of the state asked to recognize the judgment), or a review of the legal principles applied in the rendering court (granting recognition or enforcement only if these principles are consistent with principles of the recognizing jurisdiction). Casad considers each of these elements on a country-by-country basis in his analysis of judgment recognition within Central America, and discovers disappointing inconsistencies in the various national experiences.

Casad next undertakes an interesting discussion of the significance of judgment recognition to the integration of multiple-state entities. New interests may arise, including those of the association, which will invariably affect judgment recognition decisions in the individual states, or possibly induce either a unification of judgment recognition rules or even create a supranational judicial authority. A supranational authority concept simply has not worked in Central America. While it would not be inconceivable to think of such a possibility where actual political and economic development keeps pace with the rhetoric, it is more practical to consider the increased potential for harmony accruing from a much smaller measure of economic or political union.

The associational interests evidenced by the United States Constitution illustrate how far judgment recognition can be carried within an associated state area. The U.S. associational interests also serve to emphasize how distant the Central American nations are from principles of full faith and credit. The discussions regarding recognition requirements (validity and finality), judgments other than for money, grounds for nonrecognition, inconsistent judgments, enforcement procedures, and recognition of conclusive (*res judicata*) effects serve to illustrate how these elements of judgment recognition are dealt with in the United States. While it is not suggested that the United States achieves an optimum level in each of these classifications, the United States does provide a standard from which to evaluate other attempts at (or prospects for) recognition even in the absence of the achievement of associated status. A question not considered is whether a federated status is necessary for an optimum judgment recognition system. State court decisions in the United States disclosing a state "nationalism," moderated only by a reluctant acknowledgement of the full faith and credit constitutional mandate do exist. Achieving a

level of judgment recognition among disassociated states that equals the level in the United States may, however, be impossible. Whether the absence of successful associated status among the Central American nations is attributable to anything more than simply an aggregation of self interests that cannot grow beyond an adolescent state is a crucial issue. Casad's book, by clearly illustrating the adolescent attitudes of these nations regarding judgment recognition, informs the reader indirectly about the prospects for meaningful future economic and political association in the area, in addition to discussing the harmonization of judgment recognition systems.

The European Economic Community is used as the second example of an associated state system, and because this system lacks the political integration of the United States, the example focuses on economic integration. The author discusses some characteristics of judgment recognition under the convention, including the types of effects (*i.e.*, recognition and enforcement), the mechanics of these effects, and the defenses to these effects (*i.e.*, public policy, lack of notice to the defendant, inconsistent judgments, choice of law considerations, and jurisdictional defects). Casad also points out the role the European Court of Justice plays in judgment recognition. His comments illustrate that as the associated state status recedes from full political integration, there is an increase in the reasons for member states to deny recognition and enforcement. Within the European Economic Community, despite its extensive economic integration, a wide variety of circumstances may create defenses. Even in the event of the re-establishment of the Central American Common Market, which achieved far less economic integration in its decade of existence than did the EEC during a comparable term, the level of judgment recognition would not be comparable to that in a federation of states, such as the United States. While a comparison of Central America and the United States may proffer a goal or standard for civil judgment recognition, a comparison with the European Economic Community allows weighing the attainment of an economic integration that will provide a preferable system of civil judgment recognition against the achievement of a realistically possible system, because the intergovernmental nexus is limited to a convention on civil judgment recognition.

Casad questions the interests of the Central American nations in recognizing foreign judgments by noting that no reference was

made to this subject by the framers of either the General Treaty of the Central American Common Market or the Charter of the Organization of American States. He states that "perhaps this omission is explainable as a product of a spirit of 'antijuridicism' that seemed to dominate the formative meetings."¹⁵ This "antijuridical" spirit should have been explored, because unless it is clearly transitory, it is crucial to the prospects of future developments. Casad suggests that the main reason for the omission was that all of the nations were parties to the Bustamante Code, which covered judgment recognition. This is unlikely because all of the countries in Central America (except Guatemala) had accepted the Bustamante Code with reservations. This can not be viewed as a successful convention on private international law. In his outline of the Bustamante Code in the subsequent chapter, Casad agrees. He states that "it is not really an effective mechanism for a judgment-recognition regime that (sic) aims at exerting optimum influence in the promotion of the goal of integration among the states of Central America."¹⁶

Before Casad analyzes the Bustamante Code¹⁷ and discusses judgment recognition on a country-by-country basis, he offers some useful comments on the variety of meanings of several terms; on how we conceive of those terms in the United States in contrast to their general meaning in civil law jurisdictions; and, more particularly, where there are variations in Latin American jurisprudence. His discussion of the legal conceptions of such terms as jurisdiction, competency, and *res judicata* illustrate the marked variance from a U.S. viewer's perception. For example, Latin America *cosa juzgada*, which is similar to *res judicata*, lacks a collateral estoppel element. While referring to these differences is useful in illustrating that judgment recognition may vary in Central America, Casad should have noted that the differences should not provide an obstacle to a unification of civil judgment recognition.

The Bustamante Code was named after Ant^onio Sanchez de Bustamante y Sirven, a Cuban jurist, prolific scholar, and former magistrate of the Permanent Court of International Justice.¹⁸ This

15. R. CASAD, *supra* note 1, at 43.

16. *Id.* at 66.

17. Bustamante Code of Private International Law, *supra* note 12.

18. See, e.g., Bustamante, LE CODE DE DROIT INTERNATIONAL PRIVÉ ET LA SIXIÈME CONFÉRENCE PANAMERICAINE (1929); Bustamante, LA COMMISSION DES JURISCONSULTES DE RIO DE JANEIRO ET LE DROIT INTERNATIONAL (1928); Bustamante, THE WORLD COURT (1925); Bustamante, AUTARQUIA PERSONAL (1914); Bustamante, EL ORDEN PÚBLICO (1893); Bustamante,

Code was an attempt to create a system of private international law that would be acceptable throughout the hemisphere. It was intended to resolve some of the difficulties inherent in the 1889 Montevideo Treaty, which was the first successful Latin American effort in unifying private international law.¹⁹ Although there was limited participation by the United States and Mexico, the Bustamante Code essentially involved Central and South America. From its inception, the Code was plagued by serious impediments. It allowed participating nations to adopt either domicile or nationality as the connecting link in choice of law issues. It also allowed nations to adopt the Code with reservations. Some South American nations did not even participate, most importantly Argentina and Colombia. Many of the nations that did participate made extensive use of the reservation power. Nevertheless, the Bustamante Code was an important contribution to the unification of private international law. The disappointments that resulted are emphasized by the fact that it was enacted when there was substantial hemispheric interest in developing international law in general. This interest seemed to transcend the retarding characteristics of nationalism. There was far greater political homogeneity among the Latin American nations at that time than exists today. This trend enhances the pessimism that permeates the most recent Latin American collaborative endeavor, the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

Casad explains the deficiencies of The Bustamante Code, particularly regarding its confusing classifications of internal public order, international public order, and international private order, which is an unexplained extension of *ordre publique*. The confusion of these provisions, which appear in the civil law section of the Code, was carried over to the recognition and execution of judgment provisions. These permit an exception where there is a "conflict with public policy or the public laws of the country in which its execution is sought."²⁰ Public order exceptions exist in the European Economic Community Convention as well as in most pri-

LECCIONES DE DERECHO INTERNACIONAL PRIVADO (1893).

19. See Segovia, EL DERECHO INTERNACIONAL PRIVADO Y EL CONGRESO SUD-AMERICANO DE MONTEVIDEO (1889).

20. The Bustamante Code contains four books, International Civil Law, International Commercial Law, International Criminal Law and International Law of Procedure. It is the last book which is Casad's principal subject, although some of the definitional problems he illustrates arise initially in an earlier book.

vate international law conventions. It is the Bustamante Code exemption that is most confusing, however, due to the lack of clarity in the provisions and the confusion caused by Bustamante's comments.

One of the curious aspects of the Bustamante Code is that it is often extensive in scope. For example, it covers *all* civil judgments. Even the EEC Convention's coverage is not this broad. Offsetting this presumed willingness to recognize a wide range of judgments are the provisions permitting reservations (the right to refuse recognition on a wide range of public policy exceptions), and the broad range of competency standards permitted of signatory states. The drafting of these sections was similar to the composing of the original Latin American Free Trade Association documents. After the intensive, but productive, discussions and drafting of provisions providing for economic integration, and upon reviewing what was to be integrated, the individual tides of nationalism surged forward to overwhelm the growing harmony. One method of determining how extensively nationalistic reservations have restricted the drafting of international conventions is, not to look at the provisions providing for unification or harmonization, but rather to look near the end of the document at the exception provisions. Analyzed by this method, it becomes clear that the Bustamante Code was from its inception handicapped in its role of becoming an effective mechanism for civil judgment recognition.

The final chapter of Casad's book discusses the work of the Second Inter-American Specialized Conference on Private International Law at Montevideo in 1979. This Conference led to several private international law conventions, including the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.²¹ Although available for ratification since 1979, by early 1985 there have been only five ratifiers. None of the Central American nations have ratified these agreements.

The Convention was designed to replace the Bustamante Code. Therefore, it should be the new arbiter of foreign civil judgment recognition in Latin America for several decades to come. This system should provide more room for improvement than did the Bustamante Code. Casad notes the precision of the new Con-

21. Chapters 2 and 10, which are the parts of the book which analyze the procedures outlined in other chapters appeared earlier as Casad, *Civil Judgment Recognition and the Integration of Multi-State Associations: A Comparative Study*, 4 HASTINGS INT'L & COMP. L. REV. 1 (1980).

vention's provisions relating to the degree of finality that foreign judgments must have to achieve recognition and enforcement. In almost every other category Casad discusses, it is clear that the Convention is not an improvement over the Code. For example, for the different forms of judgments subject to recognition and enforcement, there are no provisions for recognition of contentious administrative judgments, as exist in the Bustamante Code, although the new Convention does have a broader application to arbitral awards. The basic procedure for recognition and enforcement remains essentially the same, but regrettably the Convention retained the Bustamante Code's provision that allows state law to govern the procedure. Thus, there remains the likelihood of requiring a *special exequatur* procedure to be decided by the Supreme Court prior to recognition or enforcement in a lower court. The competency provisions in the Inter-American Convention are less satisfactory than those in the Bustamante Code. There is no standard notice requirement included in the Convention referring to the laws of the recognizing state. The Convention's recognition of the *res judicata* effects of foreign judgments appears, in most aspects, to be no better than in the Bustamante Code. The provisions on reciprocity, public order, and exceptions are similar to, and preserve the inadequacies of, the Bustamante Code. The Code addressed the issue of pending actions in the enforcing state which was omitted in the new Convention. The addition of another condition to be met before a judgment is entitled to recognition is a significant new problem. The parties must have had an opportunity to present their defense. The provision is unclear in meaning and, as Casad points out, may offer "a potential for protracted litigation over the interpretation of the requirement every time a foreign judgment is presented for recognition or enforcement."²² There is an unusual new provision that requires that any declaration *in forma pauperis* recognized in the state rendering the judgment must be recognized in the enforcing state. Casad's conclusion that the new convention is not a significant improvement over the prevailing regime is a tactful understatement.

The attempts of Latin American jurists to unify private international law has a long history of intensive and dedicated efforts made by a series of outstanding Latin American jurists. Their work has produced documents which have had serious shortcomings, but which could have provided an underlying framework for the indi-

22. R. CASAD, *supra* note 1, at 180.

vidual national judiciaries. While the Central American legislatures were receptive to the idea of ratifying international agreements - each ratified the Bustamante Code - all but Guatemala ratified it only with notable reservations. These problems are exacerbated by a judicial experience which has not contributed to the harmonization process. Added to this must be the difficult access to decisions and the relatively small number of decisions. This illustrates the obstacles to the unification of private international law in Central America, if not throughout all of Latin America. The new Convention has not resolved the problems raised by the Bustamante Code and its life over the past half-century. Unification within the next few decades will occur only because national judiciaries in certain countries possess a vision of unification of private international law. Such a vision would be expressed by the ratification and adoption of the positive interpretive methodology of the new Convention. But even if the Convention is not ratified, that vision could be expressed using the old rules.

Casad's final paragraph correctly suggests that adoption of the 1979 Convention "would not lead to a significant improvement over the regime that presently prevails in Central America."²³ This prediction becomes even more forceful when consideration is given to the fact that most Central American nations are likely to ratify the Convention only after making changes consistent with their individual conceptions of sovereignty, as they did with the Bustamante Code. Casad states that "[w]hat is needed (in the view of an interested outsider) is a regime that would be tailored to the conditions of Central America; and this regime should be reinforced by a Central American Court."²⁴

If the Central American nations could determine what their common conditions are, such a regime might be possible. It is far more likely that there will be harmonization if these nations attempt to break away from the larger and more dominant nations of South America that also participated in both the Bustamante Code and the Inter-American Convention, and seek a convention which they can accept without reservations. This would effectively reduce the obstacles carefully outlined by Casad and is within the realm of possibility. Are there any significant grounds for believing in Central American unity? Are Costa Rica and Paraguay any less

23. *Id.* at 181.

24. *Id.*

compatible than Costa Rica and Guatemala? Should Central American nations forget regional unity and seek association in larger groups? Recent years have seen a political diversity develop in this area unlike any that have tested either that area or Casad's associated nation comparison, the European Economic Community.

The possibility of the fulfillment of Casad's suggestion of reinforcement by a Central American court is unlikely. The history of judicial harmonization in Central America has been marked by the inability to create a Central American Court of Economic Integration. The brief and disappointing history of the Central American Court of Justice evidences the difficulties encountered by attempts at unification. Our hopes should lie with attempts at judicial harmonization by national courts. Knowing how to create institutions does not necessarily mean knowing how to use the institutions once created.

Casad's book explains the growth of private international law within Central America and the obstacles confronting that growth. The book leaves a sense of frustration. It illuminates the many points of conflict. There are better alternatives than those implemented by Central America thus far. Casad has made his contribution. The task is now before those nations which deserve and expect a better unification of law than they have been able to achieve.

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